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Supreme Court of the United States.

OCTOBER TERM, 1942.

No. 199.

J. H. CRAIN AND R. E. LEE WILSON, JR., Trustees of Lee Wilson & Company, A Business Trust, *Petitioners*,

v.

THE UNITED STATES.

On Petition For a Writ of Certiorari to the Court of Claims.

PETITIONERS' REPLY BRIEF.

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On July 2, 1942, petitioner filed its petition for a writ of certiorari and stated its reasons for the granting of the writ. In due time the United States filed its brief in opposition to the granting of the writ and this reply brief is directed to that brief in opposition.

1. *The Bankhead Cotton Act Was Unconstitutional.*

The petition alleges that the decision of the Court of Claims is in conflict with *Thompson* v. *Deal*, 92 F. (2d) 478 (C.A.D.C.); *United States* v. *Moor*, 93 F. (2d) 422 (5 C.C.A.); and *Stahmann* v. *Vidal* (N. Mex. Dist. Ct.), wherein the Bankhead Cotton Act was held to be unconstitutional.

Respondent urges in reply (Br. 6–7) that the Court of Claims did not pass upon the question of the constitutionality of the Act. This statement comes as a surprise when the Court of Claims devoted nearly two pages (R. 8–9) to a discussion of that question and then stated that "we do not think the plaintiffs

are justified in assuming * * * that the Bankhead Act was unconstitutional"; when one Judge concurred in the decision on the ground that petitioners had made no showing "to overcome the presumed constitutionality of the Bankhead Act" (R. 16); and when another Judge dissented on the ground that the Act was unconstitutional (R. 17).

Of course, the Court of Claims decided that the Bankhead Act was constitutional (inferentially, if not in exact words). That question was alleged in the petition before the Court (R. 4) and *had* to be disposed of on the demurrer.

In the Government's brief to this Court (filed April 9, 1938) in opposition to the granting of certiorari in *Stahmann et al.* v. *Vidal* (October Term, 1938, No. 12), Mr. Justice Robert H. Jackson, the Solicitor General, stated (pp. 14–15):

> The constitutionality of that [Bankhead Cotton] Act is the only question involved in *United States* v. *Lee Moor*, No. 854, present Term, now pending before this Court on petition for certiorari filed by the United States. Questions relating to the validity of the Bankhead Cotton Act are not materially different from the questions relating to constitutionality of the Kerr-Smith Tobacco Act, c. 866, 48 Stat. 1275. That Act was held unconstitutional by the Circuit Court of Appeals for the Sixth Circuit in *Glenn* v. *Smith*, 91 F. (2d) 447, and the petition for certiorari, No. 599, present Term, was denied by this Court on March 28, 1938. If similar disposition is made of the petition for certiorari in *United States* v. *Lee Moor*, *supra*, [which was done, 303 U. S. 663] and if the Court should grant the instant petition for certiorari, the Government suggests that it be limited to the question decided by the court below.

From the language quoted, it is perfectly obvious that the Government recognized at that time that the Bankhead Cotton Act was unconstitutional, when it stated that questions relating to its validity "are not materially different from the questions relating to constitutionality of the Kerr-Smith Tobacco Act," which act had already been held invalid. Clearly the Government admitted in that case that the Bankhead Act

was unconstitutional when it requested this Court (p. 15 of its brief), in granting certiorari, to limit its consideration to the question of whether the cotton producers were the proper parties to sue for the refund rather than the ginner of the cotton. It is hard to believe that this Court in granting certiorari in that case would have so limited the question if it did not understand the Government's position to be that the Bankhead Act was unconstitutional and if it did not agree with that position.

Respondent's representation in this case that the Court of Claims "did not determine the question of constitutionality" (Br. 7) appears to be unwarranted. The petition before the Court alleged unconstitutionality and the Court was compelled to overrule that allegation in order to sustain the demurrer, because a tax collected under an unconstitutional statute always gives rise to a valid claim for refund.

Even though respondent states that the Court of Claims did not determine the question of constitutionality of the Bankhead Act, it suggests (Br. 7) that *Mulford* v. *Smith*, 307 U. S. 38, overrules the decisions relied upon by petitioners as being in conflict with the holding of the Court of Claims, and states that that decision upheld a statute similar to the Bankhead Cotton Act. Inferentially then respondent admits that the Court of Claims *did* uphold the validity of the Bankhead Act. This puts the decision in direct conflict with the holdings set out on pages 5 and 6 in the petition for certiorari, as stated therein, and justifies the petition on that ground.

2. *The Second Deficiency Appropriation Act of 1938 Is Not Applicable.*

Respondent (Br. 7) urges that the Court of Claims was correct in holding that petitioners could not recover from the United States, whether or not the Bankhead Act was valid. In support of this position, it relies upon the provisions of the Second Deficiency Appropriation Act of 1938. That act provided that no refund of the Bankhead tax should be made unless the tax was paid *in money to the Collector*.

The Bankhead Cotton Act provided that all cotton which a

farmer produced in excess of his allotment (made by the Secretary of Agriculture) was subject to a tax which had to be paid before he could sell his cotton. The tax could be paid in money at approximately five cents per pound or in exemption certificates which he could purchase under regulations of the Secretary of Agriculture at approximately four cents per pound. *The tax had to be paid to the Collector of Internal Revenue either in money or in exemption certificates* before the farmer received from the Collector bale tags which permitted him to market his cotton. It was these payments made to the Collector *in money* that were made refundable under the Second Deficiency Appropriation Act of 1938. The petitioners are suing for the money which they paid for exemption certificates to agents of the Secretary of Agriculture. Clearly, the Second Deficiency Appropriation Act is no bar to recovery and the Court of Claims so held (R. 10).

The case of *Cook* v. *United States*, 115 F. (2d) 463 (5 C.C.A.), relied upon by respondent, does not support respondent's position. It is true that, from a reading of the Court's opinion, it is difficult to ascertain the grounds of recovery set forth in the original complaint, but an inspection of the complaint filed in the District Court in that case, shows clearly that the claim is based solely upon the provisions of the Second Deficiency Appropriation Act of 1938. (A certified copy of the complaint filed in the District Court is being lodged with the Clerk of this Court as evidence of this statement.) In appealing to the Circuit Court in the *Cook* case, the petitioner invoked the Tucker Act, but, not having commenced the action under the provisions of that Act, he was precluded from availing himself of it in the Circuit Court. The *Cook* case, therefore, does not support respondent here, where the Tucker Act was invoked in the original complaint (R. 3–4, paragraphs 10, 11, 14, and 15).

3. *Petitioners' Payments Were Covered Into the General Fund.*

Respondent's next contention (Br. 8–9) is that, when petitioners purchased tax exemption certificates from E. L. Deal,

the pool manager and agent of the Secretary of Agriculture, the United States received the money as a trustee for the cotton producers who produced less cotton than their allotments. The Court of Claims took the position that "not one penny of the amount paid into the pool went into the general fund of the Treasury of the United States" and that "the United States had no pecuniary interest in the fund as such" (R. 15). That, however, does not appear to be the question. The real question is: Did the United States, as trustee or otherwise, take the money of petitioners under compulsion and in the guise of a tax, under a law later held to be invalid, and, having done so, should it not repay same?

The petition in the Court of Claims alleges that the amounts *collected from petitioners* were covered into the general fund of the Treasury of the United States (R. 4). Because the case was considered on demurrer, petitioners had no opportunity to prove this fact and the Court disregarded the allegation and determined otherwise.

The case of *S. R. Brackin* v. *The United States*, 44 F. Supp. 327 (now on petition for certiorari in this Court, October Term, 1942, No. 363) was pending in the Court of Claims while the instant case was pending there. The Court decided that case on the evidence before it. One of the findings was that no funds received in connection with the pools were covered into the general fund of the Treasury and that the United States did not profit or receive any benefit from such funds (R. 9 of *Brackin* case).

After the Government had received a favorable decision from the Court of Claims and after the time had expired in which to file a motion for a rehearing under that Court's rules, the Government filed a motion for leave to file a motion out of time (p. 21 of the Brackin record). Attached to said proposed motion were a letter from the Department of Justice to the Treasury Department and a reply from the latter to the former. The purport of those letters is that the money paid by the cotton producers to Deal as the agent of the Secretary of Agriculture *did* go into the general fund of the United States

and that the United States could have appropriated the money for some other purpose. (See motion and letters attached to the petition for certiorari in the *Brackin* case.) Obviously, the Assistant Attorney General did not want to be charged with the responsibility of having induced an erroneous decision from the Court of Claims and, even though too late under the Court's rules, sought by said motion to call the Court's attention to its erroneous finding and holding. No other reasons appear for the unusual action of the Assistant Attorney General.

Thus, it appears that the Court of Claims was led into an erroneous finding and decision in the *Brackin* case, which doubtless induced the Court of Claims to take an erroneous position in the instant case, when it failed to accept as admitted for the purpose of the demurrer the facts pleaded in the petition. Petitioner admits that the Court of Claims could hardly have decided the *Brackin* case one way and the instant case the opposite way, but the error of the Court of Claims was in deciding both cases wrong. Obviously, the Assistant Attorney General is now in agreement with this last proposition.

This last position taken by the Department of Justice and the Treasury Department in the *Brackin* case is in line with the position taken by the Department of Agriculture in its Regulations B.A. 219 as amended March 6, 1935, wherein it said:

> Sec. 61 (a)(6). If the Board finds that the certificate has been stolen, the Division of Cotton shall cause notice of such theft and a copy of the report of the Board's investigation to be delivered to the Solicitor of the United States Department of Agriculture for possible action by the United States Department of Justice with a view to investigation and to prosecution for theft of Government property (since such certificate is the property of the United States until it is delivered to the producer or trustee named therein).
>
> * * * * * * * * *
>
> Sec. 61 (b)(5). If the Board finds that the certificate has been stolen, the Division of Cotton shall cause notice of such theft and a copy of the report of the Board's investigation to be delivered to the Solicitor of the United States Department of Agriculture or possible action by the

> United States Department of Justice with a view to investigation and to prosecution for theft of Government property (since such certificate is the property of the United States until it is delivered to the producer or trustee named therein).

It would seem that, if the United States were selling *its property*, the money received therefor belonged to the United States and should have gone into the general fund of the United States, as the Assistant Attorney General would now have the Court of Claims hold.

4. *Facts Well Pleaded Must Be Accepted on Demurrer.*

In a foot note on page 9 of its brief, respondent admits that the Court of Claims erroneously failed, in ruling on the demurrer, to give effect to the allegation in the petition that the checks paid by petitioner for exemption certificates were covered into the general fund of the United States, but suggests that the legal effect of that fact must give way to the regulations of the Department of Agriculture. There is nothing sacred about self-serving regulations. Respondent's suggestion might be entitled to some consideration if the Assistant Attorney General had not sought to correct the Court's decision in the *Brackin* case (by correcting the facts) as pointed out above.

5. *The United States Is Liable to Petitioners Regardless of its Liability to Others.*

On page 9 of its brief, respondent makes the assertion that the United States is no more obligated to make restitution to petitioners, than it is to make restitution to producers who bought exemption certificates from other producers. The Court of Claims emphasized the same argument. It is a queer doctrine that one can successfully avoid making amends for a wrong, just because he is not liable to another party who has been wronged in the same manner by someone else. Such an argument or such a defense should not be countenanced.

6. *The Payments of Petitioners Were Made Under Duress.*

Respondent states (Br. 10) that it was not necessary for the Court of Claims (in order to reach its decision) to hold as it did that purchases of exemption certificates by petitioners were not made under duress. Respondent could hardly contend here that there was no duress in view of this Court's decision in *Stahmann* v. *Vidal*, 305 U. S. 61.

SUMMARY.

Respondent's contentions may be summarized as follows:

Respondent has suggested in its brief that the Court of Claims did not pass upon the constitutionality of the Bankhead Cotton Act, but this suggestion has been shown to be erroneous. Respondent has suggested that, even if the Bankhead Act were invalid, petitioners could not recover because of the provisions of the Second Deficiency Appropriation Act of 1938, but that Act did not apply to facts such as are found in this case and the Court of Claims so held. Respondent has suggested that the United States in accepting money for exemption certificates, acted only as trustee for the farmers who did not produce their full allotment of cotton and that the United States had no interest in and received no benefit from the fund, but this contention has been refuted by its own action in suggesting the opposite in its belated motion in the *Brackin* case. Respondent has admitted that the Court of Claims should have given effect to the allegation in the petition that the money paid for exemption certificates was covered into the general fund of the United States, but contends that the legal effect of such a holding is controlled by self-serving regulations of the Department of Agriculture. This contention is exploded, however, by its own action in the *Brackin* case referred to above. Respondent has contended that it is not liable to make restitution to petitioners, whose money it took under compulsion, because it is not liable to make restitution to someone else whose money it did not take. The Court of Claims held that there was no duress when it

took the money of petitioners under an invalid act, but respondent, realizing that such a position conflicts with this Court's holding in *Stahmann* v. *Vidal, supra,* suggests that it was not necessary for the Court to make such a holding.

Such are respondent's contentions and representations to this Court. In other words it asks this Court to deny the writ on grounds, everyone of which has been shown herein to be without merit. The words of the Circuit Court of Appeals, Eighth Circuit, in *Christie-Street Commission Co.* v. *United States,* 136 Fed. 326, 329, seem appropriate here:

> There are few more grievous wrongs than the denial by a nation of a hearing and trial of the just claims which its citizens may have against it. * * * Justice demands, and a wise public policy requires, that nations should submit themselves to the judgments of impartial tribunals, to the enforcement of their contracts and to satisfaction of their wrongs, as universally as individuals.

WHEREFORE, it is submitted that the writ of certiorari should be granted.

Respectfully submitted,

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